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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 74

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
Appellants,
vs.
UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.

Appeal from the United States District Court for the District of Columbia

Brief for Appellees Pacific Motor Trucking Company and General Motors Corporation

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INDEX

TABLE OF AUTHORITIES CITED

STATUTES

MISCELLANEOUS

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OPINION BELOW

The opinion of the District Court (R. 70) is reported in 170 F. Supp. 38. The involved reports of the Interstate Commerce Commission (R. 54, 8) are published in 71 M.C.C. 561 and 77 M.C.C. 605.

JURISDICTION

The final order of the District Court was entered January 30, 1959, (R. 87). Notice of Appeal was filed March 27, 1959 (R. 88). Jurisdiction of this Court is invoked under

28 U.S.C. § 1253 (R. 89). Probable jurisdiction was noted on October 12, 1959 (R. 92).

STATUTES INVOLVED

The relevant provisions of the Interstate Commerce Act, including the National Transportation Policy (49 U.S.C., preceding §§ 1, 301, 901 and 1001); § 5(2)(a) and (b) (49 U.S.C. § 5(2)(a), (b)); § 205 (g) (49 U.S.C. § 305(g)); § 208(a) (49 U.S.C § 308(a)); § 209(b) (49 U.S.C. § 309 (b)); § 210 (49 U.S.C. § 310); and § 216(c) (49 U.S.C. § 316 (c)), and Public Law 85-163 of August 22, 1957 (71 Stat. 411) are set forth in Appendix A *infra*, p. 1.

QUESTIONS PRESENTED

Appellants' Brief, pages 2 and 3, does not accurately set forth the questions presented. Appellees submit that the actual issues are as follows:

1. The Interstate Commerce Commission granted a contract carrier permit to a motor carrier subsidiary of a railroad but imposed a restriction confining the service to points on the lines of the parent railroad, a limitation which it described as one of "the restrictions usually imposed in common carrier certificates in order to insure that the service rendered thereunder shall be no more than that which is auxiliary to or supplemental of train service." The question thus presented is whether, under section 209(b) of the Interstate Commerce Act, as amended August 22, 1957, and the National Transportation Policy, and in the absence of "unusual conditions" such as those disclosed in *American Trucking Ass'ns v. United States*, 355 U.S. 141 (1957), the Commission lawfully refused to impose additional restrictions, usually imposed in common carrier certificates intended to make the service auxiliary to or sup-

plemental to rail service, where it appeared that such restrictions would convert the applicant into a common carrier.

2. Section 210 of the Interstate Commerce Act prohibits a person holding a contract carrier permit when such person or a person controlling such person holds a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory, unless the Commission finds that this is consistent with the public interest and the National Transportation Policy. Two questions are presented in this connection:

(a) Did the Commission violate the policy of this section where it granted a contract carrier permit to a motor carrier whose parent company operated as a common carrier by rail in the same territory?

(b) Did it violate the policy of this section where the contract carrier also operated as a common carrier by motor vehicle in the same territory, but where the Commission made the required ultimate finding that such dual operation was consistent with the public interest and the National Transportation Policy, and in support thereof required the motor carrier applicant to waive all right to transport the same commodities as a motor common carrier, found that applicant's past service in a dual capacity had been without criticism, and reserved the right to reconsider this issue at any future date should the present facts change so as to bring about an improper competitive situation or result in improper discrimination or preference?

3. Whether complaining motor carriers and their trade associations have standing to sue to set aside an order of the Commission granting a contract carrier permit to another motor carrier to transport commodities where the Commission finds that its order would have no adverse

competitive effect upon the traffic of the complaining motor carriers because the commodities involved were presently moving exclusively by rail and because, even if the permit were denied, there would be no diversion of the traffic to the complaining motor carriers?

STATEMENT

This is a direct appeal, pursuant to 28 U.S.C. § 1253, from the final decree, dated January 30, 1959, (R. 87) and decision (R. 71) of a specially constituted three-judge District Court, which dismissed on the merits appellants' complaint to set aside an order of the Interstate Commerce Commission. A majority of the court dismissed the complaint on the further ground that the appellants had no standing to sue (R. 85-86).

Appellants are three motor carrier trade associations (American Trucking Associations, Inc., Contract Carrier Conference of American Trucking Associations, and National Automobile Transporters Association) and six motor carriers (common carriers: Convoy Company, Robertson Truck-A-Ways, Inc., Western Auto Transports, Inc., and Kenosha Auto Transport Corp.; and contract carriers: B & H Truckaway, and Hadley Auto Transport). The Commission's report and order under attack, dated September 9, 1958, (R. 8) granted a motor contract carrier permit under section 209(b) of the Interstate Commerce Act (49 U.S.C. § 309(b)) to Pacific Motor Trucking Company (referred to herein as PMT) to transport automobiles and trucks from the plants of the General Motors Corporation (hereinafter referred to as GM), situated in Oakland, Raymer, and South Gate, Calif.[1] in interstate commerce to points in other

1. The Oakland and Raymer plants are engaged in the manufacture of Chevrolets while the South Gate plant manufactures Buicks, Oldsmobiles and Pontiacs. Raymer and South Gate are situated in the Los Angeles area.

western states as hereinafter described. PMT is a wholly-owned motor common and contract carrier subsidiary of Southern Pacific Company (hereinafter referred to as SP), which is a common carrier by railroad operating in California, Nevada, Oregon, Utah, Arizona, New Mexico and Texas.

Both PMT and GM were permitted to intervene as defendants in these proceedings (R. 74), filed answers (R. 46, 64), and participated in the oral argument. The Interstate Commerce Commission, named as a defendant, filed an answer (R. 68) and defended the case. The United States, also named as a defendant, filed an answer (R. 67), stating (R. 68, 74): ". . . The United States does not participate in the defense of the Commission's order but does not oppose its defense." Of such answer the District Court stated (footnote 1, R. 74):

> "This is of particular significance in view of the fact that the United States on occasion has seen fit to oppose actively orders of the Interstate Commerce Commission."

PMT, at the time of the filing of the involved applications with the Interstate Commerce Commission, was engaged as a common carrier, and also for a long time, as a contract carrier, exclusively for GM in both California intrastate commerce and interstate commerce. The scope of its interstate common carrier authority was described thus by the Commission (R. 18):

> "Applicant, a wholly-owned subsidiary of Southern Pacific Company, a common carrier by railroad, presently holds various certificates issued by this Commission authorizing the transportation as a common carrier of general commodities, with certain exceptions, between points in California, Oregon, Nevada, Arizona, New Mexico, and Texas, generally over regular routes paralleling generally the rail lines of Southern Pacific.

This common-carrier authority, except between certain origins and destinations in Oregon and California, is, with minor exceptions, restricted to service which is auxiliary to or supplemental of the rail service of its proprietary railroad."

Its existing intrastate and interstate contract carrier authority to transport automobiles and trucks for GM was described by the District Court as follows (R. 71-72):

"PMT since December 10, 1935, has held contract carrier operating authority from the Railroad Commission of California for intrastate operations within that State. The Interstate Commerce Commission (hereinafter referred to as the Commission) has issued to PMT four prior contract carrier permits for transportation of new automobiles, new trucks, and new buses, in initial movements in truckaway and driveaway service (1) from Oakland, California, to the non-rail point of Hawthorne, Nevada, and Nevada rail points on the Southern Pacific (MC 78787, Sub 23, issued June 20, 1944); (2) from Los Angeles, California, to Calexico and San Ysidro, California, both on the Mexican border (MC 78787, Sub. 27, issued April 21, 1950); (3) from Raymer, California, to points in the Los Angeles Harbor Commercial Zone, for transshipment by water (MC 78787, Sub 30, issued June 22, 1950); and (4) from Oakland, California, to Carson City and Minden, Nevada, both being non-rail points (MC 78787, Sub. 31, issued June 21, 1955). PMT's only shipper under these permits has been GM. Thus, prior to filing of the four new applications involved in this case, the Commission had issued to PMT contract carrier operating authority from GM plants in California for physically interstate service across the state line into Nevada, and for foreign commerce physically within California."

The scope of the proceedings before the Commission was set forth by the District Court thus (R. 72):

> "The order complained of grew out of extensive proceedings before the Commission following the filing of the four applications by PMT, seeking to extend its service as a contract carrier for GM in the Pacific Coast area for the transportation of a single commodity, new automobiles and trucks. In general, by the Sub 34 application, PMT sought to extend its contract carrier service from the two GM Chevrolet plants at Oakland, California, to all Oregon points which are stations on SP; by the Sub 35 application the right to serve three additional non-rail points[2] in Nevada from Oakland, California; by the Sub 36 application, to serve all Arizona points which are stations on SP; and by the Sub 37 application, authority to round out its service areas from the Oakland and Raymer plants to include all points in the seven states of Washington, Oregon, Idaho, Nevada, Utah, Arizona, and New Mexico, whether or not they are stations on SP, and to begin new service from the Buick-Oldsmobile-Pontiac plant at South Gate, California, to a seven-state area, namely, Washington, Oregon, Idaho, Nevada, Utah, Arizona, and Montana."

It is significant, as the Commission's decision shows, that though the instant applications involved a rather broad geographic extension of PMT's contract carrier authority for GM, traffic-wise they presented but a minor extension. Thus the Commission stated that PMT was presently "providing General Motors with motor transportation in the movement of a substantial volume of traffic to intrastate points in California and to interstate points within the scope of its existing permits" (R. 22). Furthermore, its report indicates (R. 21) that only a relatively small portion

2. Austin, Tonopah and Yerington, Nevada.

of the total output of the Oakland and Raymer plants was moving to points outside of California involved in these applications.

Appellant truck lines' operating authority is described in detail in the Commission's decision (R. 24-26). From this it appears that, with the exception of Kenosha Auto Transports Corp., the six appellant truckers had certain authority to transport automobiles between some of the points involved, but that neither singly nor together did they possess the right to perform the entire transportation which PMT sought to perform, nor to perform any of the service involved in the Sub 35 application (*i.e.*, service from Oakland, California, to Austin, Tonopah and Yerington, Nevada).

A word is appropriate here as to the proceedings before the Commission and as to the participation therein by appellants. The Sub 34 application was heard on a separate record, none of the appellants participating as protestants, and after oral argument was granted by the entire Commission in its decision of May 8, 1957 (R. 10, 12, 54). The Sub 35 and 36 applications were heard on a consolidated record and proposed reports by an examiner and a joint board, respectively, recommended that the authority be granted (R. 13). None of the appellants filed exceptions in the Sub 35 case but it was stayed by Division 1 of the Commission to give consideration to the question of dual operations (R. 13). Three of the truck line appellants, Robertson, B & H, and Hadley, filed exceptions to the proposed report in the Sub 36 case (R. 13). All motor carrier appellants presented evidence in opposition to the Sub 37 application which was heard on a separate record (R. 10,

23), as did also six rail protestants connecting with SP[3] which handled the GM auto traffic in joint rail service with SP (R. 23). Exceptions to a proposed report in the Sub 37 case were filed by the three trade association appellants, by four of the individual motor carrier appellants and by the opposing rail carriers, while PMT and GM also excepted to the recommended denial of part of the sought authority (R. 14, 16). Thereafter, upon petition of American Trucking Associations, Inc., and Contract Carrier Conference of American Trucking Associations, Inc., the Commission reopened the Sub 34 case "for reconsideration on the present record solely with respect to whether the motor-contract carrier authority granted therein should be made subject to the substituted-service restrictions usually imposed in certificates issued to rail carriers or motor affiliates of rail carriers" (R. 12). Subsequently the Sub 34 proceedings and the three other applications were consolidated for oral argument in which all of the appellants participated (R. 10, 12).

There followed the Commission's report and order of September 9, 1958 (R. 8), now under attack, the effect of which was well described by the District Court as follows (R. 72):

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3. The rail protestants were (1) the Union Pacific Railroad Company which connects with Southern Pacific at Los Angeles and serves points in Nevada, Utah, Idaho, and Montana, (2) the Northern Pacific Railway Company which connects with Southern Pacific at Portland, Ore., and serves points in Washington, Idaho, and Montana, (3) the Great Northern Railway Company which connects with Southern Pacific at Portland and there receives traffic moving to destinations in Washington, Idaho, and Montana, (4) the Spokane, Portland & Seattle Railway, hereinafter called SP&S, a jointly-owned subsidiary of Great Northern and Northern Pacific, operating between Portland, Ore., and Spokane, Wash., (5) the Bamberger Railroad Company, hereinafter called Bamberger, connecting with Southern Pacific at Ogden, Utah, and operating between Ogden and Salt Lake City, Utah, and (6) the Portland Traction Company, a short-line carrier serving the Portland, Ore., area (R. 23).

"By the order here under attack, the Commission granted the authority sought in the Sub 35 proceeding, service from the Oakland plant to three additional non-rail points in Nevada, which had been opposed by only one protestant, not a party to this action; but as to the Sub 34, 36 and 37 applications, the Commission denied entirely the authority requested to serve destinations in states not served by SP (Washington, Idaho, and Montana) and limited the authority granted to destinations in the other states (Arizona, Nevada, Oregon, Utah, and New Mexico) to points located on the rail lines of SP. Thus, the Commission's order granted only a limited portion of the authority sought in the four applications, and issuance of the new permits thereunder was conditioned on curtailment of existing common carrier authority to transport automobiles and trucks."

During the interval between the two Commission decisions in this matter Congress on August 22, 1957, adopted Public Law 85-163 (71 Stat. 411) which materially amended the provisions of the Interstate Commerce Act dealing with contract carriers. The amendment changed the definition of "contract carrier by motor vehicle" in section 203(a)(15) of the Interstate Commerce Act (49 U.S.C. § 303(a)(15)) to read as follows:

"The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exceptions therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

It also added the following new sentence to section 209(b) of the Interstate Commerce Act dealing with issuance of contract carrier permits:

> "In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements."

It is abundantly clear that the Commission in its decision carefully considered and applied both the above important amendments achieved by the 1957 Act.

Thus, after quoting the new definition of "contract carrier by motor vehicle" the Commission found (R. 19):

> "Applicant proposes to render a service only for General Motors, the only shipper it presently serves, and to assign its equipment to the exclusive use of that shipper. Clearly its proposed service will be that of a contract carrier."

With respect to the Commission's consideration of the criteria specified in section 209(b), as amended in 1957, the District Court stated (R. 79-83):

> "The order here challenged shows on its face that the Commission did consider those criteria, making findings with respect to each of them.
>
> "As to the number of shippers to be served by the applicant and the nature of the service proposed, the Commission found the evidence established that PMT's sole purpose was to afford GM extended driveaway and truckaway transportation of new cars and trucks from GM's plants at Oakland, Raymer, and South

Gate, California, and that PMT's equipment was to be assigned to the exclusive use of that shipper.

"As to the effect of granting the permit upon the services of protesting carriers, both rail and motor, the Commission made detailed findings as to the amount of GM traffic therefofore handled, or not handled, by the protesting carriers, both rail and motor. Careful consideration was given to the probable loss of GM traffic by rail carriers in joint-line service with SP, if authority were granted to PMT to serve points beyond SP's line, and the probable loss to a motor carrier presently serving GM dealers in Washington and Alaska, if PMT should be authorized to operate within the State of Washington. The Commission also weighed the effect on other independent motor carriers, both common and contract, authorized to serve any of the areas affected by the proposed extension of authority. It found that Hadley, one of the two protesting contract carriers, was dedicated to serving Ford, GM's largest competitor, that B & H, the other protesting contract carrier, possessed limited authority for operations from Vernon, California, and had in the past served Studebaker-Packard, and that Robertson, a common carrier protestant, transported vehicles principally for Chrysler.

"As to the effect denial of the permit would have upon the applicant and the shipper and the changing character of the shipper's requirements, the Commission found that the shipper, GM, had established its need for extension of the personalized type of contract service which PMT had been rendering it, and rendering well, from other points for many years; that in view of the limited storage facilities maintained by GM at its plants, transportation service must be closely coordinated with plant operations to avoid congestion or delay in deliveries to dealers; that use of any other carrier would require outgoing shipments to be dispatched through the shipper's incoming gate, causing confusion and disarranging the operations at the plant,

which are geared to use of PMT's services from its nearby yard. The proposed extension of service was supported by GM in order to obtain faster transportation on shipments requiring expedited handling, direct deliveries to dealers at off-rail points, more flexible and expeditious handling of consolidated shipments, and to meet the competition of other automobile manufacturers, notably Ford and Chrysler, which have motor services available. The Commission further found that, should the requested authority be denied, GM had indicated it would not use the services of the protesting motor carriers, but either would support an application for similar authority by an independent motor contract carrier presently serving a GM branch plant at Arlington, Texas, or would institute proprietary operations. The order further shows that denial of the permit would cause substantial damage to the applicant, PMT, which has dedicated its contract carrier service to GM operations for many years, acquiring special equipment to meet GM's needs, and that PMT's contract carrier operations for GM during the years 1953 through the first eleven months of 1956 averaged 86.35% of PMT's total contract carrier operations. Thus, although the Commission found an 'absence of unusual conditions' which would justify the issuance of permits for service to points not on SP's rail line, there was, in the court's opinion, substantial evidence of special circumstances justifying the extensions of PMT's contract carrier authority to serve GM.

* * * * * * *

"That the Commission did apply the Act as a whole, giving effect to the policies underlying §§ 5(2)(b), 207, and 210, as well as carefully following the guide laid down by the Congress in § 209(b) for determining public interest and compliance with the national transportation policy, is borne out not only by the findings of fact recited in the Commission's order, but by its conclusions as to the scope of extended operations.

which would be in the public interest, and by the curtailed authority which the Commission granted. It will be observed that the requested authority was denied where it would encroach upon existing service by other carriers, and granted where the evidence of record showed that the proposed extension would have little or no effect upon present and future operations of the protestants."

The last statement of the court is fully borne out in the following excerpt from the Commission's decision (R.26-28):

"*We deem it of controlling significance here that in the territory under consideration automobiles are commodities which can be economically and advantageously transported by rail to on-rail points, and that the nature of the movements from these three California plants is such as to render it unlikely that a significant amount of freight would be diverted from Southern Pacific to its motor contract carrier subsidiary if the proposed service were limited to Southern Pacific points. It does not appear that the amount of traffic likely to be diverted under these conditions would be large enough to afford either Southern Pacific or applicant an unfair competitive advantage over other carriers or to constitute a destructive competitive threat to other automobile producers.* On the other hand, use by General Motors of applicant's proposed service on a Statewide basis would permit Southern Pacific to invade the territory served by other rail lines and by the existing motor carriers and would inevitably result in the diversion of a large percentage if not all of the traffic now moving in rail joint-line service. Such eventuality has in no way been justified and the public interest in forestalling it is apparent. . . . On the other hand, insofar as Southern Pacific points are concerned, the authority sought represents no more than a request by Southern Pacific to perform truck transportation, albeit contract-carrier transportation, to the same points it serves,

as a rail carrier. Motor protestants argue that the grant of authority to such points as recommended by the examiner reflects a discriminatory bias favoring the protesting railroads and penalizing the protesting motor carriers. *However, it is clear that all of the traffic except that moving on government bills of lading[4] is now originated by Southern Pacific, and that regardless of whether the Sub 37 application is granted or denied, as concerns rail points of the Southern Pacific, there will be little or no diversion to the existing independent motor operators. In other words, a grant of authority to applicant to serve only those points which are stations on the lines of Southern Pacific should not result in any appreciable alteration of the existing competitive situation and should not unduly restrain competition or in any degree adversely affect the operations of other carriers.*" (Emphasis added.)

Finally the Commission made the required ultimate findings under both sections 209(b) and 210 of the Interstate Commerce Act to the effect that the operations of PMT as ultimately granted, and that its dual operations as a common and contract carrier, would be consistent with the public interest and the National Transportation Policy (R. 33).[5]

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4. It is apparent that the granting of the present authority to PMT will have no effect whatsoever on the traffic moving on government bills of lading. Thus, in this connection, the Commission found (R. 21): "A small number of automobiles and trucks manufactured at these three plants move on government bills of lading in which the government agency concerned rather than General Motors designates the transporter. These shipments have for the most part been handled by existing motor common carriers, including Convoy, Insured Transporters, and Robinson" [sic. Robertson].

5. The printed record (R. 33) should contain the following additional language after "require," line 11, R. 33: "will be consistent with the public interest and the national transportation policy". Such language, being the required ultimate finding under section 209(b) was inadvertently omitted in the Commission's decision, as originally transmitted to the parties, but was soon corrected and is shown in the published report (77 M.C.C. 605).

Discussion of the Commission's remarks and subordinate findings concerning the questions of "auxiliary and supplemental restrictions" and "dual operations" raised by appellants will be deferred to the argument below.

Appellants' motion for a temporary restraining order was denied after hearing (R. 33). On November 24, 1958, permits for the operations authorized by the Commission's order were issued by the Commission (R. 73). Appellants thereafter abandoned their prayer for an interlocutory injunction and the case was heard by the three-judge court on the merits.

SUMMARY OF ARGUMENT

I. Appellants' contentions that the Commission violated congressional policy and this court's decisions dealing with motor carrier operations of railroad subsidiaries are based on the major premise that the Commission here granted PMT "unrestricted authority" so far as the usual restrictions to make operations of a railroad motor carrier subsidiary "auxiliary and supplemental" to the rail service of its parent are concerned. This major premise is patently incorrect as the District Court properly recognized. Thus, the Commission specifically listed five restrictions, either geographical or functional in nature, specifically described them as the "auxiliary and supplemental" restrictions customarily imposed by it in common motor carrier rail affiliate cases, and specifically imposed, among others, one of them, the geographical restriction that service was confined to points on the lines of PMT's rail parent, SP. Such geographical restriction was the one first adopted by the Commission in the earliest days of its regulation of motor carriers as the basic "auxiliary and supplemental" restriction to carry out the special statutory policy now contained in section 5(2)(b) of the Interstate Commerce Act with re-

spect to acquisition by railroad subsidiaries of motor carrier operations. It has consistently been considered as such ever since by the Commission, this court and Congress, and has been regularly included in grants of operating authority to rail affiliates even though the Commission in later cases has also included additional auxiliary and supplemental restrictions of a more functional nature. As a practical matter it is also evident that this restriction not only was a severe limitation on PMT but was also an "auxiliary and supplemental" restriction in the sense that it was imposed by the Commission merely to carry out the special policy applicable to rail subsidiary entry into motor carriage and not a mere limitation of the permit to the area for which there was a need for the service. Thus, it appears from the Commission's report that GM needed the service to off-rail points as much as to SP rail points, and that the restriction was intended for the special benefit of the independent trucker protestants to prevent PMT from serving areas which they were authorized to serve.

It is obvious from the Commission's decision that it carefully followed and applied to this contract carrier situation this court's recent decision in *American Trucking Associations, Inc. v. United States*, *supra*, which held that the policy regarding rail subsidiary entry into motor common carriage laid down in section 5 (2) (b) of the Interstate Commerce Act and the National Transportation Policy was not a rigid requirement and did not prevent the Commission from granting a certificate without auxiliary and supplemental restrictions where unusual conditions existed. Thus, because the Commission did not find the existence of "unusual conditions" generally, it imposed the above-mentioned auxiliary and supplemental restriction confining PMT service to points which were stations on the rail lines of SP.

The Commission declined to impose the other functional "auxiliary and supplemental" restrictions, not because of the existence of "special circumstances" or "unusual conditions" within the meaning of the *American Trucking Associations* case, but because such restrictions would have converted applicant into a common carrier with respect to such operations. Considered in context the District Court's decision cannot be regarded as holding to the contrary. The reasons why this conversion would have resulted are because under numerous Commission decisions coordinated rail-motor operations, which result where the additional functional auxiliary and supplemental restrictions are imposed, can only be accomplished by through routes and joint rates between the railroads and motor carriers, and under section 216(c) of the Interstate Commerce Act only common carriers and not contract carriers by motor vehicle are authorized to enter into through routes and joint rates with railroads. Since, under section 209(b) of the Interstate Commerce Act, both before and after the 1957 amendment, the Commission was authorized to impose only "reasonable terms, conditions and limitations, consistent with the character of the holder as a contract carrier," it was without power to impose the other functional auxiliary and supplemental restrictions sought by appellants, which were plainly inconsistent with PMT's contract carrier status.

It is evident too that the Commission had no power to adopt the other alternative suggested by appellants: grant a common carrier certificate, instead, to PMT with the additional functional auxiliary and supplemental restrictions attached. Under section 209(b) the Commission must grant a contract carrier permit if it appears, among other things, as the Commission found here, that the applicant is "fit, willing and able properly to perform the service of a con-

tract carrier by motor vehicle". In past cases only where it found that the sought contract carrier operations were, in fact, common carrier operations rather than contract carrier operations, which it specifically found not to be true here, has the Commission issued a common carrier certificate in lieu of a contract carrier permit. Such limitation on the Commission's power is supported too by the fact that Congress in the pertinent Public Law 85-163 of 1957 added new section 212(c) of the Interstate Commerce Act permitting the Commission to convert outstanding contract carrier permits to common carrier certificates only where it finds that the operations do not conform to the definition of contract carrier operation and are, instead, those of a common carrier.

The language and legislative history of the 1957 amendment to section 209(b) clearly show that it did not establish any rigid rule that the Commission must, in contract carrier cases, attach all auxiliary and supplemental functional restrictions customarily attached in common carrier applications by motor carrier subsidiaries of railroads or adopt any more rigid rule than that applied as to such applications in the *American Trucking Associations* case. As originally introduced this legislation would have not only limited the definition of "contract carrier" but also sharply limited the power of the Commission to grant contract carrier permits in section 209(b) by providing that the Commission could not grant such a permit unless "existing common carriers are unwilling or unable to provide the type of service for which a need has been shown". Upon objections of the contract carrier industry that this was too restrictive the Commission and Congress agreed to eliminate this restriction and to substitute in section 209(b) the requirement that the Commission should consider certain prescribed criteria in determining whether issuance of a

permit would be consistent with the public interest and the National Transportation Policy. None of these specific criteria indicate that Congress intended to apply any peculiarly rigid restriction where railroad subsidiaries were contract carrier applicants. This is particularly significant in view of the facts: (1) that the Commission prior to this enactment had granted numerous unrestricted permits to PMT and other rail subsidiaries; (2) that the Commission's action in granting an unrestricted common carrier certificate to a rail subsidiary had been specifically affirmed by a three-judge federal district court (later affirmed by this court in the *American Trucking Associations* case); and (3) railroads had a much smaller share of the total intercity tonnage as compared to motor carriers than they did in 1935 and 1940 when Congress adopted the restrictive policy as to engaging in the trucking business by railroad subsidiaries, and were thus much less of a competitive threat to independent truckers if allowed through subsidiaries to enter contract motor carriage.

II. The Commission under the plain language of section 210 of the Interstate Commerce Act could not lawfully deny a contract motor carrier permit to a rail subsidiary merely because its parent was also a common carrier by railroad. That section, by its terms, prohibits, except as the Commission may authorize it, only dual operations by the same or an affiliated person as a common and a contract carrier by motor vehicle. Congress has never seen fit to include dual operations with railroads in this section since it was enacted in 1935, although the Commission first granted PMT contract carrier authority to serve certain SP rail points in 1944, and although Congress made other extensive changes in the regulation of contract carriers in 1957. To construe this section to prevent contract carriage by a rail subsidiary of the same commodities transported by

the parent as a railroad common carrier would, as a practical matter, almost completely bar rail subsidiary entry into motor contract carriage, since a railroad, unlike a motor common carrier, cannot lawfully waive the right to transport a single commodity as PMT was required to do here in order to obtain contract carrier authority. Congress has never given the slightest indication that it intended any such absolute bar. Such a construction would also deprive GM of the benefit of contract carrier service by PMT comparable to that enjoyed by its largest competitor through one of the contract carrier appellants. It is evident, however, that the Commission carefully scrutinized and considered PMT's relationship to SP in making the required statutory finding concerning the public interest and the National Transportation Policy under section 209(b) and that there are adequate subordinate findings supporting its conclusion that the authorized permit was consistent therewith.

The Commission's ultimate finding under section 210, that dual operations by PMT as a contract and common carrier by motor vehicle were consistent with the National Transportation Policy is rationally supported, in the light of the underlying anti-discrimination policy of section 210, by its action and subordinate findings for which there is evidentiary support, and are therefore binding on this court under settled law. Thus, it required PMT to waive all right to transport the involved commodities as a common carrier so that it could not transport the same commodities as a common and a contract carrier; found that its past service in a dual capacity had been without criticism; found, in effect, the possibility of discrimination would be negligible since it could serve but one shipper as a contract carrier; and guarded against the possibility of future discrimination by retaining the right to "reconsider this issue at any

future date should the present facts change so as to bring about an improper competitive situation or result in improper discrimination or preference." It did not follow a policy in this railroad subsidiary case different from that applied in cases involving independent motor contract carriers, since there, as appellants themselves describe the latter cases, it is only where "the commodities to be transported by the common and contract carrier are wholly different, that the Commission has approved dual operations". Here, because of PMT's waiver of the right to transport automobiles and trucks as a common carrier, which was exacted by the Commission as an express condition to its granting of dual authority, the commodities were wholly different.

III. The majority of the court below properly held that appellants had no standing to sue. From the Commission's decision it is clear that while some of the appellant truck lines had authority to serve part of the involved territory, the restricted permit granted to PMT did not result in any injury to the appellants. Thus, the Commission found that the involved GM traffic was all moving by rail and would not in the future be handled by the appellant truckers regardless of whether the PMT application was granted; and that the granting of the permit would not result in any loss of traffic or competitive injury to the appellant truck lines but only in diversion of traffic from SP to PMT. The majority of the court found: "not only is the complaint devoid of any allegation of direct injury, present or threatened, to the motor carrier plaintiffs by granting of extension of operating authority to PMT, but, at the hearing on the merits, there was no showing of actual or anticipated direct injury such as would entitle them to institute this action." Such lack of injury is also to be inferred from the fact that appellants, after their request for a temporary

restraining order had been denied by the court, voluntarily withdrew their claim for an interlocutory injunction. Under this state of facts *Atchison, T. and S.F. Ry. v. United States*, 130 F. Supp. 76 (E.D. Mo. 1955), *aff'd per curiam*, 350 U.S. 892 (1955), is controlling authority that appellants had no standing to bring this action under section 205(g) of the Interstate Commerce Act and section 10 of the Administrative Procedure Act.

ARGUMENT

I. The Commission's Action in Restricting PMT's Contract Carrier Operations to Points on the Rail Lines of Its Parent in the Absence of "Unusual Conditions", but in Refusing to Impose Other Functional "Auxiliary and Supplemental" Restrictions Is Thoroughly Consistent with This Court's Decisions and Applicable Provisions of the Interstate Commerce Act.

A. The Commission's Discussion Concerning Restrictions.

Set forth below verbatim is the Commission's discussion concerning this question (R. 28-31):

> "As seen, the proof in connection with each of the considered applications in our opinion justifies a grant of some authority. Protestants, however, in various pleadings and at oral argument contend that all four of the considered applications should be denied (1) because the proviso in section 5(2)(b)[6] must be read into section 209 and operates as a bar to the issuance of a contract carrier permit to an applicant railroad or an applicant railroad subsidiary, and (2) because the holding by applicant of the permits it seeks herein and its presently-held certificates would not be consistent with the public interest and the national transportation policy.

6. (Footnote 4 in Commission's decision) This provides that the Commission shall not authorize a railroad or its affiliate to acquire a motor carrier unless it finds that "the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

"After careful study we are impelled to disagree. Our statutory authority to impose terms and conditions in permits issued under section 209 is derived from part (b) of that section, and not from section 5(2)(b). The rejection by the Commission of a similar contention with respect to section 207 in *Rock Island Motor Transit Co. Com. Car. Application*, 63 M.C.C. 91, 100, was sustained by the United States Supreme Court on December 9, 1957, in *American Trucking Associations Inc., et al. v. United States*, 355 U.S. 141, subsequent to the argument in these cases. Therein the Supreme Court held that the Congress did not intend the rigid requirement of section 5(2)(b) to be considered as a limitation on certificates issued under section 207 but added (pp. 151-152):

> '* * * that the underlying policy of section 5(2)(b) must not be divorced from proceedings for new certificates under section 207. Indeed the Commission must take "cognizance" of the National Transportation Policy and apply the Act "as a whole". But for reasons we have stated we do not believe that the Commission acts beyond its statutory authority when in the public interest it occasionally departs from the auxiliary and supplementary limitations in a section 207 proceeding.'

Although the Court, in that proceeding, was dealing only with applications for common carrier certificates, we think that undoubtedly the same principle applies here where contract carrier permits are sought and in reaching the conclusions above indicated, namely, that some authority should be granted in each proceeding, we have, in fact, given due consideration to the National Transportation Policy and to the principles which underlie section 5(2)(b).

"While we have power to impose restrictions in any permit granted authorizing motor contract carrier operations, such action is not required by either sec-

tion 5(2)(b) or the provisions of the National Transportation Policy; and it remains to be considered next whether any restrictions should be imposed here. The restrictions usually imposed in common carrier certificates issued to rail carriers or their affiliates in order to insure that the service rendered thereunder shall be no more than that which is auxiliary to or supplemental of train service are: (1) the service by motor vehicle to be performed by rail carrier or by a rail-controlled motor subsidiary should be limited to service which is auxiliary to or supplemental of rail service, (2) applicant shall not serve any point not a station on the railroad, (3) a key-point requirement or a requirement that shipments transported by motor shall be limited to those which it receives from or delivers to the railroad under a through bill of lading at rail rates covering, in addition to the movement by applicant, a prior or subsequent movement by rail, (4) all contracts between the rail carrier and the motor carrier shall be reported to the Commission and shall be subject to revision if and as the Commission finds it to be necessary in order that such arrangements shall be fair and equitable to the parties, and (5) such further specific conditions as the Commission, in the future, may find it necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, train service. However, if warranted by special circumstances, certificates have been issued without these restrictions to railroads or their affiliates, whether acquired by purchase as in *Louisville, N.A. & C.R. Co.—Purchase—Meerman*, 45 M.C.C. 6, and *Southern Pacific Company—Control; Pacific Motor Trucking Co.—Purchase—Lowinel Trucking Co.*, 60 M.C.C. 373, or as the result of an application filed under section 207, as in *Texas & Pacific Motor Transport Co., Ext.—Point Blue, La.*, 47 M.C.C. 45, *Burlington Truck Lines, Inc., Ext.—Iowa*, 48 M.C.C. 516, and *Rock Island Motor Transit Co. Com. Car. Application, supra.*

"It has long been recognized by this Commission that substituted motor service in lieu of rail operations constitutes common carriage. *Substituted Freight Service*, 232 I.C.C. 683; *Willett Co., of Indiana, Inc., Extension—Ill., Ind., and Ky.*, 21 M.C.C. 405; *Louisiana, A & T Ry. Co., Common Carrier Application*, 22 M.C.C. 213; *Hagerty Contract Carrier Application*, 26 M.C.C. 413, and *Siebert Extension—Woodbury and Elmer, N.J.*, 34 M.C.C. 340. In the two last-cited proceedings, the applicants sought permits to transport less-than-carload freight between stations on a railroad. Neither applicant proposed to have direct dealings with the general public, and each proposed to dedicate his equipment to the railroad exclusively. In each instance the proposed operations were found to be those of a common carrier, and the applicants therein were granted certificates limited to service auxiliary to or supplemental of rail service. Since substituted service is common carriage at rail rates and on rail billing, all of the restrictions usually employed to apply to substituted motor-for-rail service could not be imposed in a permit, for to do so would be to command the holder to render a common-carrier service. We conclude, therefore, that there is no basis for imposing the usual restrictions numbered 1, 3, or 5 in any permits which may be granted in these proceedings. On the other hand, we do not believe that Congress intended, except in unusual circumstances, to allow any railroad, through the medium of a motor subsidiary, to provide all-truck service as a contract carrier in competition with other rail lines and independently operated motor carriers without safeguards to insure that such service shall not be broader in scope than its rail operation. In the absence of any showing of unusual conditions in these proceedings, any permits issued to applicant will contain a territorial limitation of the service authorized to points which are stations on the Southern Pacific railroad. Also a restriction is warranted reserving to the Commission the right to

impose in the future any restrictions or conditions which may then appear to be necessary or desirable in the public interest. Nothing in *Scott Bros., Inc., Extension of Operations—Jersey City, supra*, or in the proceedings in which applicant herein obtained unrestricted contract-carrier authority, is inconsistent with the foregoing."

B. Appellants' Major Premise That the Commission Granted "Unrestricted Authority" Is Patently Incorrect Since the Geographical Restriction of Service by a Rail Motor Carrier Subsidiary to Points on the Lines of Its Parent, Imposed Here, Has Been Considered by the Commission and This Court from the Very Outset of Motor Carrier Regulation and Consistently Thereafter as the Basic Restriction to Make Such an Applicant's Service "Auxiliary and Supplemental" to the Rail Service of Its Parent.

The major premise in appellants' argument is that the Commission granted PMT "unrestricted authority" in so far as the usual restrictions to make operations of a railroad motor carrier subsidiary "auxiliary and supplemental" to the rail service of its parent are concerned. (Appellants' Brief, pp. 31-34). Assuming this to be true, appellants then argue that since under the pertinent provisions of the Interstate Commerce Act and the National Transportation Policy, as construed by this court in the *American Trucking Ass'ns* case, *supra*, unrestricted operations can be permitted in motor common carrier cases only where "unusual conditions" exist and that since "unusual conditions" did not exist here, therefore the Commission violated the statutory policy and that decision (Appellants' Brief, pp. 11-43).

This whole argument must fall for the basic reason that appellants' major premise is patently incorrect as the District Court properly recognized. Thus the court said (R. 83):

> "* * * The extended operations authorized, however—far from being 'unrestricted' operations by PMT in the contract carrier field, as the plaintiffs have consistently referred to them—were restricted in many

respects. The authority granted was limited to points already served by SP (so as not to affect adversely other railroads carrying GM traffic beyond SP to other rail points), and limited to points on the rail line of SP (so as not to cut in on territory which potentially might be served by independent motor carrier protestants), subject to the condition that 'the permits authorizing such operations should be issued upon receipt of a written request from applicant for the imposition of a restriction against the transportation of automobiles and trucks' in its outstanding common carrier certificates (in the interest of avoiding the possibility of dual motor carrier operations), and the further condition 'that there may from time to time in the future be attached to the permits granted such reasonable terms, conditions and limitations as the public interest and national transportation policy may require.'"

Appellants' statement (App. Brief 32) "that both the majority and dissenting opinions clearly indicate that all members of the Commission understood that the authority issued was, in fact, unrestricted" is not only completely erroneous, so far as the majority was concerned, but is not even candid. Even a cursory reading of the majority opinion reveals that just the opposite was true and that the majority clearly felt that in restricting PMT's service geographically to points on the line of SP it was truly imposing a traditional "auxiliary and supplemental" restriction. Thus, as indicated above, *supra*, page 25, the Commission (R. 29-30) listed five numbered restrictions which it specifically described as, in the absence of "special circumstances", "the restrictions usually imposed in common carrier certificates issued to rail carriers or their affiliates in order to insure that the service rendered thereunder shall be no more than that which is auxiliary to or supple-

mental of train service"; listed, among them, as (2), the restriction that "applicant shall not serve any point not a station on the railroad"; and specifically imposed that and one other important restriction here in the following language (R. 31):

> "* * * On the other hand, we do not believe that Congress intended, except in unusual circumstances, to allow any railroad, through the medium of a motor subsidiary, to provide all-truck service as a contract carrier in competition with other rail lines and independently operated motor carriers without safeguards to insure that such service shall not be broader in scope than its rail operation. In the absence of any showing of unusual conditions in these proceedings, any permits issued to applicant will contain a territorial limitation of the service authorized to points which are stations on the Southern Pacific railroad. Also a restriction is warranted reserving to the Commission the right to impose in the future any restrictions or conditions which may then appear to be necessary or desirable in the public interest.[7] Nothing in *Scott Bros., Inc., Extension of Operations—Jersey City, supra*, or in the proceedings in which applicant herein obtained unrestricted contract-carrier authority, is inconsistent with the foregoing."

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7. This reservation of power was an ample remedy to deal with any destructive or unfair competition in case any should develop in the future. Thus, this court said of a similar reservation of power in *American Trucking Ass'ns v. United States, supra*, 355 U.S. at 154 (1957):

> "If, as appellants fear, the unrestricted operations are destructive of competition or otherwise detrimental to the public interest, we believe the situation would not be without remedy. The Commission has retained jurisdiction 'to impose in the future whatever restrictions or conditions, if any, appear necessary in the public interest by reason of material changes in conditions or circumstances surrounding applicant's operations in relation to those of competing motor carriers.' 63 M.C.C., at 108. This reservation gives it continuing jurisdiction to make certain that the unlimited certificate issued here does not operate to defeat the National Transportation Policy."

Finally, since the Commission just above specifically distinguished this case from *Scott Bros., Inc., Extension of Operations—Jersey City*, 34 M.C.C. 163 (1942), and previous contract carrier grants to PMT, which generally did not contain the above geographical restriction and referred to the latter cases as granting "unrestricted contract authority", it is quite evident that the Commission considered the present grant not unrestricted.

This geographical restriction on motor carrier service by a rail subsidiary to points on the line of its parent was the one first adopted by the Commission in the earliest days of its regulation of motor carriers as the basic "auxiliary and supplemental" restriction to carry out the special statutory policy now contained in section 5(2)(b)[8] of the Interstate Commerce Act, with respect to acquisitions by railroad subsidiaries of motor carrier operations. Thus, after referring to that policy, as originally contained in the Motor Carrier Act of 1935, the Commission in the very first volume of its decisions under that Act granted a certificate to a rail subsidiary authorizing service "confined to service auxiliary and supplemental to that performed by the Pennsylvania Railroad Company in its rail operations and in territory parallel and adjacent to its rail lines". *Pennsylvania Truck Lines, Inc.,—Control—Barker*, 1 M.C.C. 101, 109-113 (1936). That the Commission intended

8. This provision states: "*Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition." It was originally enacted in substantially this form in section 213(a)(1) of the Motor Carrier Act of 1935 (49 Stat. 556) and was carried over into section 5(2)(b) by the Transportation Act of 1940 (54 Stat. 906).

by this "auxiliary and supplemental" restriction primarily to restrict rail subsidiary motor carriage to points on the lines of the parent railroad is further demonstrated from its supplemental decision in the *Barker* case (*Pennsylvania Truck Lines, Inc.,—Control—Barker M. Frt.*, 5 M.C.C. 9, 11-12 (1937):

> "The scope of the operations proposed to be retained is broader than intended by the conditions we stated in our prior report. Hence, it will be of advantage to the parties in this and later proceedings if we here amplify the meaning of those conditions. Approved operations are those which are auxiliary or supplementary to train service. Except as hereinafter indicated, nonapproved operations are those which otherwise compete with the railroad itself, those which compete with an established motor carrier, or which invade to a substantial degree a territory already adequately served by another rail carrier.
>
> *Approved operations are best illustrated by the substitution of trucks for peddler or way-freight service in what is commonly called 'station-to-station' service.*" (Emphasis added.)

This geographical restriction was uniformly and consistently imposed by the Commission as virtually the only "auxiliary and supplemental" restriction in a long line of cases thereafter, as the Commission pointed out in *Rock Island M. Transit Co.—Purchase—White Line M. Frt.*, 40 M.C.C. 457, 465 (1946):

> "From the date of the decision in the *Barker* case to shortly before enactment of The Transportation Act, 1940, the princip. s there recognized and applied, controlled the disposition of practically every rail-motor acquisition case. During the period indicated, approximately 40 of such cases were decided. *In each of them approval of the proposed acquisition was made subject, except in unusual circumstances, to the con-*

dition that in operations under the acquired operating rights no service should be given to or from, or any traffic interchanged at any point not a station on the line of the acquiring railroad." (Emphasis added.)

In 1938 in *Kansas City Southern Transport Co., Inc., Com. Car. Application*, 10 M.C.C. 221, 240-41, the Commission first added what may be described as the more exclusively functional[9] "auxiliary and supplemental" restrictions and listed substantially the same five restrictions which are set forth in its instant decision. There, where the Commission later said its views first "ripened into a policy",[10] it is highly significant, however, that the Commission continued to include as restriction number (2) the same geographical restriction imposed here, confining the service to points on the lines of the rail parent.

The practice of including as one of the five "auxiliary and supplemental" restrictions, the pertinent geographical restriction has consistently been followed by the Commission ever since and has consistently been recognized and approved by this court. In *Willett Co. of Ind., Inc., Ext. Fort Wayne—Mackinaw City*, 42 M.C.C. 721, 727 (1943), the Commission attached these five auxiliary and supplemental restrictions, including the geographic one, and its action was upheld by this court in *Interstate Commerce Commission v. Parker*, 326 U.S. 60 (1945). *In Rock Island M. Transit Co.—Purchase—White Line M. Frt., supra*, 40 I.C.C. at 477-8 (1946) the Commission, where it previously had reserved the power in a certificate to impose "auxiliary

9. Those numbered (1), (3) and (5) in the present decision: auxiliary and supplemental service, movement on railroad bills of lading with prior or subsequent rail haul and retention of power to impose further auxiliary and supplemental restrictions.

10. *Rock Island Motor Transit Co. Com. Car. Applications*, 63 M.C.C. 91, 101 (1954).

"and supplemental" restrictions but had not done so, amended the certificate to include the five specific auxiliary and supplemental restrictions, including the geographic one. Its action was again sustained by this court in *United States v. Rock Island Co.*, 340 U.S. 419 (1951), the court remarking at page 443:

> "The Commission has expressed its policy to limit rail affiliates to services in aid of rail transportation by the phrase, perhaps too summary, auxiliary and supplemental. Though the phrase is difficult to define precisely, its general content is set out in *Texas & Pacific Motor Transport Co. Application*, 41 M.C.C. 721, 726, quoted n. 19, *supra*.[11] While the practice of the Commission has varied in the conditions imposed, the purpose to have rail-connected motor carriers act in coordination with train service has not. Circumstances change. Different conditions are required under different circumstances to maintain the balance between rail and motor carriage. We do not think the meaning of auxiliary and supplemental is limited to the Commission's practice at any particular time. So long as it may fairly be said that the practice required from the motor carrier falls within the meaning the Commission has given to auxiliary and supplemental, the condition is valid."

Finally, in *Rock Island Motor Transit Co. Com. Car. Application*, 63 M.C.C. 91, 108-109 (1954), the Commission removed all of the restrictions, including the geographical one which it had previously imposed on the involved rail subsidiary in its earlier *Rock Island* case, *supra*, as an

11. The geographical restriction was also included among the "auxiliary and supplemental" restrictions in the cited case, *Texas & Pac. Motor Transport Co. Application*, 41 M.C.C. 721, 723, 726 (1943). It was also included in a subsequent decision involving this carrier *Texas & Pac. Motor Transport Co. Com. Car. Application*, 47 M.C.C. 753 (1948), which was affirmed by this court in *United States v. Texas & Pac. Co.*, 340 U.S. 450 (1951).

exception to the usual policy "justified by the evidence in that proceeding". Again this court affirmed, sustaining the Commission's power to grant what it described as "unrestricted operations", so far as "auxiliary and supplemental" restrictions were concerned where "special circumstances" prevailed. *American Trucking Ass'ns v. United States*, *supra*, 355 U.S. at 149, 152. There is a marked contrast between the situation involved in that case, where the Commission did not impose the previously included geographical restriction, and which could thus properly be described as involving "unrestricted operations", and that here where the geographic restriction was specifically imposed.

Congress also must be deemed to have considered the geographic restriction as one of the usual "auxiliary and supplemental" restrictions generally applied by the Commission in this type case and to have approved that course. Thus, in the Transportation Act of 1940 (54 Stat. 906), it reenacted, as section 5(2)(b) of the Interstate Commerce Act, the peculiar restrictions applicable to railroad subsidiaries which had been contained in section 213(a) of the Motor Carrier Act of 1935 (49 Stat. 556). Such action has been considered by this court as denoting congressional approval of the long-standing administrative practice in both the *Rock Island* (340 U.S. at 432) and the *American Trucking Ass'ns* cases (355 U.S. at 150), the court remarking in the former case that some of the Commission's decisions (including the *Kansas City Southern Transport* case, *supra*, where the geographic restriction was specifically included) "were specifically called to Congress' attention prior to the enactment of the 1940 Act".

As a practical matter it is evident that the geographical restriction was a severe limitation on the authority sought here since the Sub 37 application requested blanket authority to serve all points in the seven-state area, including

three states, Montana, Idaho and Washington in which SP did not even operate. As a practical matter, too, it is evident that no restriction could be more basically designed to make motor service "auxiliary and supplemental" to rail service as one confining the truck service to rail points. Considering also the basic spirit behind the statutory rail restrictions in section 5(2)(b), that of preventing monopolization by railroads of motor carriage,[12] it is plain that this geographic restriction was "auxiliary and supplemental" in the sense that it was included not for the benefit of the shipper but for the protection of motor carriers and thus in furtherance of the basic spirit of the statute. There was as much if not more evidence of need for this service by GM to off-rail points as to those on rail, the Commission remarking (R. 22) as to the Sub 37 application: "The proposed service is supported by General Motors in order to obtain * * * direct deliveries to dealers at off-rail points." Clearly the Commission in imposing this geographical restriction had in mind not only the protection of the connecting rail line protestants, but also more especially the protection of the independent motor carriers, as its decision shows. (See portion of the decision (R. 31) quoted above, page 29.) Certainly this restriction, as a practical matter, was more plainly for the protection of the motor carriers

12. This court said of that statutory policy in *United States v. Rock Island Co., supra*, 340 U.S. at 432:

> "Such limitation was in furtherance of the National Transportation Policy, for otherwise the resources of railroads might soon make over-the-road truck competition impossible, as unregulated truck transport, it was feared, might have crippled some railroads. Motor transportation then would be an adjunct to rail transportation, and hoped-for advancements in land transportation from supervised competition between motors and rails would not materialize. The control of the bulk of rail and motor transportation would be concentrated in one type of operation."

than for that of the protesting railroads. Thus the protesting railroads did not even operate in two of the involved states served by SP (Arizona and New Mexico), and the connecting protestant railroads would have been adequately protected if the Commission had adopted only the less severe restriction advocated by Commissioner Freas in his concurring opinion (R. 35), that service should have been excluded only to points "which are stations on the lines of the connecting rail carriers of Southern Pacific Company, but not stations on the lines of the latter, * * *."

C. The Commission Specifically Followed the American Trucking Ass'ns Case and Congressional Policy, Attaching the Geographical "Auxiliary and Supplemental" Restriction Because of the Absence of "Unusual Conditions". Its Refusal to Attach Other Functional "Auxiliary and Supplemental" Restrictions Was Not Because of "Unusual Conditions" but Because They Would Have Converted Applicant Into a Common Carrier as to These Operations and Were Thus Beyond Its Power to Impose Under Section 209(b). The District Court Did Not Sustain the Commission's Refusal to Attach Such Conditions Because It Found "Unusual Conditions" or "Special Circumstances" to Exist.

It is clear from the portion of the Commission's decision (R. 28-31) quoted in A above (*supra*, pp. 23-27) that the Commission carefully followed and applied to this contract carrier situation the same policy enunciated in this court's recent decision in *American Trucking Ass'ns* case, which held that the policy regarding rail subsidiary entry into motor common carriage laid down in section 5(2)(b) of the Interstate Commerce Act and the National Transportation Policy was not a rigid requirement and did not prevent the Commission from granting a certificate without auxiliary and supplemental restrictions where unusual conditions existed. The portion of the decision quoted above plainly establishes that it was due to the holding in that case that the Commission specifically imposed the restriction confining PMT service to SP rail points "in the absence of any showing of unusual conditions in these

proceedings" (R. 31 *supra*, p. 26). In other words, since the "unusual conditions" or "special circumstances" found to justify departure from the usual auxiliary and supplemental restrictions in the *American Trucking Ass'ns* case were not found to exist here (with one exception), the Commission, in compliance with that case here refused to depart from the usual policy and in accordance with that policy attached (with one exception) the geographic "auxiliary and supplemental" restriction. The one exception, where the record shows that "special circumstances" did exist,[13] was the authorization of service in the Sub 35 proceeding from Oakland, California, to Austin, Tonopah and Yerington, Nevada, points not on SP lines.

Appellants, however, contend that since the record does not establish the existence of "special circumstances" or "unusual conditions", the Commission improperly departed from applicable policy, as defined in the *American Trucking Ass'ns* case, in refusing to apply other "auxiliary and supplemental" restrictions of a more functional nature, customarily employed in rail subsidiary motor common carrier cases. The Commission listed these restrictions as follows (R. 29-30):

> "(1) the service by motor vehicle to be performed by rail carrier or by a rail-controlled motor subsidiary should be limited to service which is auxiliary to or supplemental of rail service, * * * (3) a key-point requirement or a requirement that shipments transported by motor shall be limited to those which it receives from or delivers to the railroad under a

13. Thus, these destination points were not on the lines of any railroad (plaintiffs' Exhibit 2 before the District Court, pf. 74 of transcript of hearing before the Commission in the Sub 35 case, which is part of the transcript of record before this court, R. 90, but was not printed) and none of the appellant motor carriers had authority to serve these points (R.24-26) or protested this application (R. 11).

through bill of lading at rail rates covering, in addition to the movement by applicant, a prior or subsequent movement by rail, * * *" and (5) such further specific conditions as the Commission, in the future, may find it necessary to impose in order to insure that the service shall be auxiliary to or supplemental of, train service."

The short answer to this contention is that such refusal was based, not on the supposed existence of "unusual conditions" or "special circumstances", which it specifically found was generally not the case here, but solely on the fact that it had no power to impose such restrictions in a contract carrier permit issued pursuant to section 209(b) because this would convert the applicant into a common carrier. This is indicated plainly in the Commission's decision as follows (R. 30-31):

"It has long been recognized by this Commission that substituted motor service in lieu of rail operations constitutes common carriage. *Substituted Freight Service*, 232 I.C.C. 683; *Willett Co., of Indiana, Inc., Extension—Ill., Ind., and Ky.*, 21 M.C.C. 405; *Louisiana, A & T Ry. Co., Common Carrier Application*, 22 M.C.C. 213; *Hagerty Contract Carrier Application*, 26 M.C.C. 413, and *Siebert Extension—Woodbury and Elmer, N. J.*, 34 M.C.C. 340. In the two last-cited proceedings, the applicants sought permits to transport less-than-carload freight between stations on a railroad. Neither applicant proposed to have direct dealings with the general public, and each proposed to dedicate his equipment to the railroad exclusively. In each instance the proposed operations were found to be those of a common carrier, and the applicants therein were granted certificates limited to service auxiliary to or supplemental of rail service. Since substituted service is common carriage at rail rates and on rail billing, all of the restrictions usually employed to apply to sub-

> stituted motor-for-rail service could not be imposed in a permit, for to do so would be to command the holder to render a common-carrier service. We conclude, therefore, that there is no basis for imposing the usual restrictions numbered 1, 3, or 5 in any permits which may be granted in these proceedings."

Appellants' assertions (Appellants' Brief, pp. 36-41) that the District Court sustained the Commission's action in this respect on other than the above grounds by improperly substituting its judgment for that of the Commission and finding, contrary to the Commission's finding, that "special circumstances" existed, are completely without basis. Reliance is placed on the following excerpt from the District Court's decision (R. 81):

> "* * * although the Commission found an 'absence of unusual conditions' which would justify the issuance of permits for service to points not on SP's rail line, there was, in the court's opinion, substantial evidence of special circumstances justifying the extensions of PMT's contract carrier authority to serve GM."

It is extremely unlikely that the court would have followed the course which appellants charge it with having followed since none of the appellees in their oral or written argument before the court sought to sustain the Commission's decision on the ground that there were "special circumstances" within the meaning of the *American Trucking Ass'ns* case. Read in context, it is manifest that the phrase "special circumstances" was not used in the sense employed in the *American Trucking Ass'ns* case. Instead, since this excerpt appears at the end of a paragraph in which the court was summarizing (R. 80) "the effect denial of the permit would have upon the applicant and the shipper and the 'changing character of the shipper's requirements", one of the specific criteria which amended section 209(b)

made it the Commission's duty to consider, it is evident that this was merely a short-hand way of saying that the Commission had duly observed that requirement. That the court did not intend to justify the Commission's action in withholding these functional "auxiliary and supplemental" restrictions on the ground that "special circumstances" existed instead of on the ground that it would convert PMT into a common carrier, is also clearly demonstrated in its following statement (R. 81) in the immediately following portion of its opinion dealing specifically with appellants' contentions regarding the restrictions:

> "* * * The Commission points out further that to apply to a § 209(b) contract carrier permit the five restrictions generally placed upon a § 207 common carrier certificate in the case of a motor carrier subsidiary of a railroad, would convert the contract carrier into a common carrier. * * *"

The reason why the imposition of these particular restrictions must necessarily have converted these operations of PMT into common carrier operations is quite apparent from the Commission's decision in *Willett Co. of Indiana, Inc., Extension—Ill., Ind., and Ky.*, 21 M.C.C. 405, 409 (1940), one of the cases cited in this connection in the present report. There the Commission observed that coordinated rail-motor service, that which results when, as in that case, the functional auxiliary and supplemental restrictions are imposed, "could only be accomplished through the medium of through routes and joint rates. * * *" Under section 216(c) (49 U.S.C. § 316(c))[14] of the Inter-

14. This section provides:
"(c) Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; * * *"

state Commerce Act only through routes and joint rates between railroads and common carriers by motor vehicle are authorized. There is no provision authorizing such between railroads and contract carriers. Appellants' argument thus leads to the absurd result that they would have the Commission attach restrictions commanding SP and PMT to do that which they cannot lawfully do under section 216(c) unless PMT be considered a common carrier as to these operations.

Under the clear language of section 209(b) of the Interstate Commerce Act the Commission had no power to impose restrictions which would have converted these operations from contract carrier to common carrier operations. Thus, both before and after that section was amended by Public Law 85-163, enacted on August 22, 1957 (71 Stat. 411), it provided that the Commission shall attach to the permit "reasonable terms, conditions and limitations consistent with the character of the holder as a contract carrier." This power to impose contract carrier restrictions is much more limited than in the case of common carriers.[15] Any requirement which might be read into the broad and general terms of the National Transportation Policy, that the Commission must attach these particular auxiliary and supplemental restrictions in a particular case must yield to the more specific requirement of section 209(b) that it cannot attach restrictions which are inconsistent with the status of the applicant as a contract carrier. Finally, considering that Congress retained the above language in the amended version of section 209(b) adopted in 1957, and considering that the primary purpose of such amended

15. The comparable provision as to common carrier certificates, § 208(a) (49 U.S.C. § 308(a)), authorizes the Commission to attach "reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require. * * *"

act (as appellants recognize, Appellants' Brief, p. 41), was to "make readily possible clearer distinctions than now exist between motor common and contract carriers" (S. Rep. 703, 85th Cong. 1st Sess., p. 3 (1957)), it would indeed be ironical if the Commission were to be held to have power to impose restrictions which would tend to eliminate distinctions *between common and contract carriers.*

It is evident, too, that the Commission had no power to adopt the other alternative suggested by appellants (Appellants' Brief, pp. 30-31): grant a common carrier certificate, instead, to PMT with the additional functional auxiliary and supplemental restrictions attached. Under 209(b) the Commission must grant a contract carrier permit if it appears, among other things, as the Commission found here, that the applicant is "fit, willing and able properly to perform the service of a contract carrier by motor vehicle". In past cases, including those upon which appellants rely (Appellants' Brief, p. 30), only where it found that the sought contract carrier operations were, in fact, common carrier operations rather than contract carrier operations, which it specifically found not to be true here, has the Commission issued a common carrier certificate in lieu of a contract carrier permit. Such limitation on the Commission's power is supported too by the fact that Congress in the pertinent Public Law 85-163 of 1957 (71 Stat. 411) added new section 212(c)[16] of the Interstate Commerce

16. This section provides:

"The Commission shall examine each outstanding permit and may within one hundred and eighty days after the date this subsection takes effect institute a proceeding either upon its own initiative, or upon application of a permit holder actually in operation or upon complaint of an interested party, and after notice and hearing revoke a permit and issue in lieu thereof a certificate of public convenience and necessity, if it finds, first, that any person holding a permit whose operations on the date this subsection takes effect do not conform with

Act permitting the Commission only to convert outstanding contract carrier permits to common carrier certificates where it finds that the operations do not conform to the definition of contract carrier operation and are, instead, those of a common carrier.

D. The Language and Legislative History of the 1957 Amendments to Section 209(b) Confirm That Congress Did Not Intend Any Rigid Rule That the Commission Must Attach All Functional "Auxiliary and Supplemental" Restrictions in Contract Motor Carrier Permits Issued to Rail Subsidiaries or Adopt Any More Rigid Rule Than That Applied as to Common Carrier Certificates Issued to Such Subsidiaries Under the American Trucking Associations Case.

Appellants contention (Appellants' Brief p. 41) that the August 22, 1957, amendment to section 209(b) contained in Public Law 85-163 (71 Stat. 411) "has no bearing on the issues here" is completely without merit. Since the amendment was enacted while this case was pending before the Commission and before the oral argument and decision the Commission under settled law, and as it did, was required to apply the statute as amended. *Ziffrin, Inc. v. United States*, 318 U.S. 73 (1943).

Both the terms and legislative history of this enactment confirm that Congress did not intend thereby to establish any rigid rule that the Commission must in contract carrier cases involving rail subsidiaries attach all auxiliary and supplemental functional restrictions customarily attached in common carrier applications by such subsidiaries or adopt any more rigid rule than that applied as to such com-

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the definition of a contract carrier in section 203(a)(15) as in force on and after the date this subsection takes effect; second, are those of a common carrier; and, third, are otherwise lawful. Such certificate so issued shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit."

mon carrier applications in the *American Trucking Associations* case.

It is true, as appellants assert (Appellants' Brief p. 41) that one purpose of S. 1384 (85th Congress, 1st Session), which was later adopted as Public Law 85-163, was to limit the number of contracts a contract carrier might hold by restricting the definition of "contract carrier" and to overturn this court's decision in *United States v. Contract Steel Carriers*, 350 U.S. 409 (1956), which permitted them to expand indefinitely (S. Rep. 703, 85th Cong., 1st Sess. (pp. 2, 3). But also, as originally introduced, the bill would have provided for a sharp restriction on the Commission's power to grant contract carrier permits under section 209(b). As the Senate Committee explained it at page 3 of the above report:

> "A further change would be effected whereby that portion of section 209(b) (49 U.S.C. 309(b)) relating to the issuance of a contract carrier permit would include a provision that a permit would be issued when it appears, inter alia, *'that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown.'*" (Emphasis added.)

It appears, however, from the above Senate Report that because of objections of the Contract Carrier Conference of the American Trucking Associations, one of the appellants in this case, that this amendment to section 209(b) would unduly restrict contract carriers, the Interstate Commerce Commission agreed before the Senate Committee to its elimination. This is shown from the following excerpts from S. Rep. 703, *supra* (pp. 4-5):

> "However, the Commission, upon reflection, on the objections of contract and private carriers to the bill, concluded that in some respects S. 1384 would provide

too rigid a pattern. It decided that the proposed requirement in section 209(b) that additional permits could be issued only upon a showing that existing common carriers are unwilling or unable to render the required types of service should be withdrawn. * * *

* * * * * * *

"Opposing the bill were contract motor carriers as represented by spokesmen for the Contract Carriers Conference of American Trucking Associations, and its members, and certain supporting shippers. * * * Amendment of the law requiring contract applicants to establish that common carriers are unwilling or unable to furnish the service would, it was urged, put to an end the extension of contract carrier service. * * *"

Obviously, the Senate Committee was convinced as to the correctness of these views. Thus, it stated (S. Rep. 703, *supra* at 3):

"* * * The committee is of the opinion, however, that, as originally introduced, S. 1384 would be unduly restrictive on contract carriage. Accordingly, the committee recommends a number of amendments to the bill."

This is indicated, too, by the fact that, in reporting out the bill which was thereafter enacted without change, the Senate Committee amended the bill by eliminating the above amendment to section 209(b) and in substituting the following new sentence in that section (S. Rep. 703, *supra*, 8):

"* * * In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service pro-

posed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements."

This is a clear indication that Congress did not intend generally by this Act that the Commission should adopt an unduly restrictive attitude toward contract carrier applications.

We turn now to the situation regarding restrictions upon railroad subsidiary entry into motor carriage which faced Congress at the time of the adoption of this amendment. It is highly significant that at such time not only was the present proceeding pending before the Commission, but there had been these developments: (1) the Commission's decision in the *Rock Island Motor Transit Co. Com. Car. Application, supra*, that it had power under applicable legislative policies where special circumstances existed to grant completely unrestricted common carrier motor certificates to rail subsidiaries had been sustained by a three-judge court (*American Trucking Associations v. United States*, 144 F. Supp. 365 (D.C. D.C. 1956)), and was on appeal to this court, (2) the Commission had already granted contract carrier permits without functional "auxiliary and supplemental" restrictions to a subsidiary of the Pennsylvania Railroad (*Scott Bros., Inc., Extension of Operations—Jersey City, supra*), and on several occasions had previously approved, without such restrictions, contract carrier permits to PMT (*Pacific Motor Trucking Co., Extension of Operations—Automobiles*, 42 M.C.C. 911 (1943); *Pacific Motor Trucking Co., Extension—New Automobiles, Trucks, and Busses, Los Angeles to San Ysidro and Calexico*, 51 M.C.C. 860 (1950); *Pacific Motor Trucking Co., Extension—Raymer to Los*

Angeles Harbor, 51 M.C.C. 861 (1950); *Pacific Motor Trucking Co., Extension—Carson City and Minden, Nev.*, 63 M.C.C. 851 (1955); and original decision of May 8, 1957 (R. 54), of the entire Commission in the Sub 34 proceedings involved herein); (3) the basic reason for enactment of specific restrictions upon rail entry into motor carriage, fear of monopolization by the rails of motor carriage,[17] which prompted enactment of such restrictions as to common motor carriage in 1935 and 1940, no longer existed in anywhere near the degree prevailing at that time, ~~inasmuch as the railroads were in 1957~~.

In this posture Congress enacted the 1957 amendment, specifically listing the various criteria which the Commission should consider in determining "whether issuance of a permit will be consistent with the public interest and the National Transportation Policy." It is highly significant that Congress chose not to say specifically that permits could not be granted to railroad subsidiaries; that it did not specifically insert the specific limited restrictive language applicable to them of section 5(2)(b) (see footnote 6, p. 23, *supra*); and that it did not specifically mention the particular element in the National Transportation Policy requiring the Commission "to recognize and preserve the inherent advantages of each" form of transportation, which element had been the basis for the Commission's action, approved by this court, in imposing such restrictions as it had traditionally imposed in applications by rail subsidiaries for new motor common carrier certificates, as compared with applications by them to acquire existing motor carrier facilities. *Rock Island M. Transit Co. Purchase "White Line" M. Frt.*, *supra*, 40 M.C.C. at 461-62?

17. *United States v. Rock Island Motor Co.*, *supra*, 340 U.S. at 432, quoted in footnote 12, *supra*.

473; *United States v. Rock Island Motor Transit Co., supra*, 340 U.S. at 427, 433. In the light of all these circumstances certainly the doctrine of *expressio unius est exclusio alterius* is applicable here and is compelling proof that Congress intended no rigidly restrictive policy to be employed in connection with entry by a rail subsidiary into contract carrier by motor vehicle operations and did intend one no more restrictive, at least, than had been theretofore followed as to entry by such subsidiaries into common carrier by motor vehicle operations, as contemplated in the *American Trucking Associations* case.

In conclusion on this point it may be said that appellants are in the unsound position of asking this court and the Commission to apply what amounts to a more restrictive policy to rail subsidiary entry into contract carriage than that traditionally applied as to such entry into common carriage, when Congress has specifically not done so and when it is even now considering whether the present statutory restrictions on railroad subsidiary motor common carriage are too severe in the light of present competitive conditions. Thus, several bills[18] were introduced in 1959 before the present Congress, on some of which hearings have recently been held, to eliminate all special restrictions on railroad subsidiary entry into motor carriage, and the Senate in 1959 adopted a resolution providing for study of various unsolved serious transportation problems, including "the subject of the ownership of one form of transportation by another" (S. Res. 29, 86th Cong., 1st Sess.).

18. H.R. 7960, H.R. 9280, S. 1353 (86th Cong., 1st Sess.).

II. The Commission Thoroughly Considered, in the Light of Section 210 of the Interstate Commerce Act, the Propriety of Granting a Contract Carrier Permit to PMT in View of the Fact That Its Parent Was a Common Carrier by Railroad in the Same Area and in View of the Fact That It Also Operated as a Common Carrier by Motor Vehicle. Its Ultimate Finding Under That Section That This Was Permissible Is Consistent with the Spirit of That Section as Well as Previous Commission Decisions. It Is Rationally Supported by the Commission's Action in Requiring PMT to Waive the Right to Transport Automobiles and Trucks as a Common Carrier, by Its Retention of Jurisdiction and by Its Subordinate Findings for Which There Is Evidentiary Support. It Is Therefore Binding on This Court.

A. The Commission's Discussion with Respect to Dual Operations.

Section 210 of the Interstate Commerce Act, so far as pertinent, provides:

> "Unless, for good cause shown, the Commission shall find, or shall have found, that both a certificate and a permit may be so held consistently with the public interest and with the national transportation policy declared in this Act . . .
>
> "(2) no person, or any person controlling, controlled by, or under common control with such person, shall hold a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory."

The Commission in both of its decisions made the required ultimate finding under section 210 that the holding of dual operating rights by PMT as a common and contract carrier by motor vehicle was consistent with the public

interest and the National Transportation Policy (R. 33, 60).

In its prior report the Commission said in support of its ultimate finding (R. 58-60):

"There remains the question of the propriety of granting applicant a permit authorizing operations of the scope indicated above while, at the same time, it also holds a certificate authorizing common-carrier operations in the same territory. Further, there is also a question as to whether we should grant such a permit in view of the extensive common carrier rail service now provided in the territory by applicant's parent corporation, the Southern Pacific Company. True, the provisions of section 210 of the act are applicable only to instances involving the holding of certificates and permits authorizing the transportation of property by motor vehicle, but even without the statutory requirements, we would be remiss in our duty were we to ignore the dual relationship between applicant, as a contract carrier by motor vehicle, and the Southern Pacific Company, as a common carrier by rail. We may inquire into the relationship incidental to the statutory findings necessary under section 209 of the act and in a proper case withhold a grant of authority or impose restrictions necessary to guard against the possibility of practices at which section 210 is aimed.

"Insofar as concerns dual operations by applicant as a common carrier and as a contract carrier by motor vehicle, the contract-carrier operations here considered are not competitive with the common-carrier operations now conducted or authorized. Most of the common-carrier authority held by applicant is restricted against the transportation of automobiles and trucks, either specifically, or in the form of a restriction against the transportation of commodities requiring special equipment. The latter restriction would not preclude the movement of a single car or truck on a unit of conventional equipment, but that type of movement is not practicable for an operation of the nature here

considered, and the restriction operates as a bar to the use of the specialized equipment here contemplated to be used. Actually, applicant has never transported an automobile or a truck under its common-carrier authority, and it expresses a willingness to have any appropriate limitation imposed upon such authority to prevent it from so doing. Although the common-carrier and contract-carrier operations are not competitive, the granting of authority which would permit applicant to serve the same shipper, either at the same plant or at any other point, both as a contract carrier of automobiles and trucks and as a common carrier of general freight, nevertheless requires careful scrutiny and special justification. The relationship between applicant and the railroad clearly opens the door for violation of the principles underlying section 210, even though not specifically covered by the statute. The granting of the instant application would permit the Southern Pacific Company to serve the same shipper, General Motors, both as a contract carrier by motor vehicle and as a common carrier both by rail and motor of general freight. * * *

* * * * * * *

"In other respects, however, we agree with applicant, Chevrolet, unlike other General Motors divisions for reasons satisfactory to it, definitely prefers to use contract carriers. We have no desire to coerce it into any different position or control its decision in any way. Applicant's past satisfactory performance in a dual capacity has been without criticism. These facts plus the fact that it is only serving a single shipper as a contract carrier and would not appear by the grant of authority here considered to be able to do otherwise, the fact that a denial of the instant application would deprive that shipper of a needed service which no other motor carrier is in a position to perform, and the lack of opposition on the part of other carriers, convinces us that we properly may approve the resultant dual operations. * * *"

In support of this ultimate finding the Commission in its final decision discussed the matter at length as follows (R. 31-32), setting forth its subordinate findings and adopting those made in its earlier report as follows:

"DUAL OPERATIONS

"The prior report in the Sub 34 proceeding fully discusses the dual operation question and needs little enlargement or repetition. The issue was argued extensively previously and the argument here is not convincing that a different conclusion is warranted. Another wholly-owned motor carrier subsidiary of Southern Pacific, Southern Pacific Transport Company,[19] holds certificates in No. MC-30319 and various sub-numbers thereto authorizing substituted motor-for-rail service auxiliary to or supplemental of the rail operations of Southern Pacific and those of an affiliated rail line, Texas & New Orleans Railroad Company, generally over regular routes between specified points in Texas and Louisiana. The additional dual operations occasioned by the grants of contract-carrier authority herein would not be such an aggravation of the existing dual operations of applicant or between applicant and the commonly controlled Texas subsidiary as to require disapproval. Compare *Texas Auto Transports, Inc., Contract Carrier Application*, 62 M.C.C. 473, 479, and *Complete Auto Transit, Inc.,—Extension, Willow Run*, 71 M.C.C. 383, 388.

"As indicated, the granting of the instant applications would allow applicant to serve the same shipper both as a contract and common carrier by motor vehicle and, through its parent, as a common carrier

19. Another motor-carrier subsidiary of Southern Pacific Company. Technically, the Commission was not required to consider the operations of this company, since it does not operate "over the same route or within the same territory" as PMT, within the meaning of section 210. The fact that it did so is another indication of the thorough consideration which it gave to the dual operations issue.

by rail. In the 54-page consolidated certificate issued to applicant in No. MC-78786, dated July 27, 1956, the 32 different commodity descriptions grouped together under an alphabetical key on sheets 37 through 39 include the descriptions 'general commodities, except * * * assembled automobiles' in descriptions F, K, L, Z-1, and Z-6, and 'general commodities' with no exceptions referring to assembled automobiles and trucks in descriptions D, H, J, N, S, T, U, Y, Z, and Z-3. Applicant has indicated its willingness to have its outstanding certificates specifically restricted against the transportation of assembled automobiles, trucks, and buses. Although there is no evidence which suggests that applicant has ever or is likely to transport such commodities as a common carrier in substituted motor for rail service, to forestall any possibility of discrimination because of the dual operations involved, our grants here will be made subject to the condition that applicant request in writing the imposition of a restriction against the transportation of automobiles and trucks in its outstanding certificates in No. MC-78786 and various subnumbers thereto which are not specifically restricted against such transportation. However, our approval of the dual operations at this time should not be construed as any waiver of our right to reconsider this issue at any future date should the present facts change so as to bring about an improper competitive situation or result in improper discrimination or preference."

B. The Commission Could Not Lawfully Deny a Contract Motor Carrier Permit to a Railroad Subsidiary Under Section 210 Merely Because Its Parent Was a Common Carrier by Railroad Serving the Same Shipper. To the Extent That It Could Take This Factor Into Consideration in Making the Required Finding as to Consistency with the Public Interest in the National Transportation Policy Under Section 209(b), It Clearly Did So, and Its Conclusions That the Authorized Permit Was Consistent Therewith Are Supported by Adequate Subordinate Findings.

The Commission under the plain language of section 210 of the Interstate Commerce Act can not lawfully deny a

contract motor carrier permit to a rail subsidiary merely because its parent was also a common carrier by railroad operating in the same territory and serving the same shipper. That section, by its terms, prohibits, except as the Commission may authorize it, only dual operations by the same or an affiliated person as a common and a contract carrier by motor vehicle. Congress has never seen fit to include dual operations with railroads in this section since it was enacted in 1935, although the Commission first granted PMT contract carrier authority to serve GM at certain SP rail points in 1944,[20] and although Congress made other extensive changes in the regulation of contract carriers in the 1957 amendment. To construe this section to prevent contract carriage by a rail subsidiary of the same commodities transported by the parent as a railroad common carrier would, as a practical matter, almost completely bar rail entry into motor contract carriage since a railroad, unlike a motor common carrier, can not lawfully waive the right to transport a single commodity[21] as PMT was required to do here in order to obtain contract carrier authority. Congress has never seen fit to provide that railroad subsidiaries can not engage in motor contract carriage. Even though section 210 thus does not apply, so far as dual operations by railroads are concerned, the fear expressed by appellants (Appellants' Brief, p. 28) that the Commission will be able to issue a myriad of contract carrier permits to railroads or their subsidiaries "just

20. The Commission granted PMT contract carrier authority to serve GM between Oakland, California, and Nevada rail points on the lines of SP in 1944 (R. 71).

21. Section 1(4) of the Interstate Commerce Act (49 U.S.C. § 1(4)) makes it "the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor. There is no comparable duty enjoined upon motor carriers in the Interstate Commerce Act.

for the asking" is hollow indeed. Not only must a railroad subsidiary seeking a contract carrier permit bear the usual burden of proof as to public interest and the National Transportation Policy under section 209(b) but it is also subject to at least some of the usual "auxiliary and supplemental" restrictions such as were imposed in this case.

It is to be noted too that to apply section 210 as an absolute bar to dual rail and motor carrier operations when it is not even an absolute bar to dual motor and common contract carrier operations would also deprive GM of the benefit of contract carrier service by PMT comparable to that enjoyed by its largest competitor through one of the contract carrier appellants. Thus, it appears that Hadley Auto Transport, one of the appellants here, performs contract carrier service for Ford Motor Company which is a principal competitor of GM (R. 20, 80).

It is evident, however, from the Commission's specific discussion of the matter set forth above (pp. 50-53) that it carefully scrutinized and considered PMT's relationship to SP in making the required statutory finding concerning the public interest and the National Transportation Policy under section 209(b). Thus it said (R. 58): "We may inquire into the relationship incidental to the statutory findings necessary under section 209 of the act and in a proper case withhold a grant of authority or impose restrictions necessary to guard against the possibility of practices at which section 210 is aimed."

The policy behind section 210, which policy the Commission considered in relation to the SP-PMT affiliation, in connection with section 209(b), is to prevent a carrier operating in both a common and contract capacity from discriminating between its shippers by charging some the regular published, common carrier rates and charging

others reduced contract carrier rates. *Scott Bros., Inc., Contract Carrier Application*, 32 M.C.C. 254; 256 (1942). In the light of this policy it is plain that there are adequate subordinate findings rationally supporting the Commission's conclusion that granting of a permit to PMT would be consistent with the public interest and the National Transportation Policy under section 209(b) despite its affiliation with SP. Thus, the Commission found in its earlier report, which findings were incorporated in its later report by reference (R. 60, 31), that in effect the possibility of discrimination was slight since PMT was to serve but a single shipper as a contract carrier and that "applicant's past satisfactory service in a dual capacity had been without criticism". Furthermore, the Commission retained jurisdiction over this whole matter, declaring (R. 32): "However, our approval of the dual operations at this time should not be construed as any waiver of our right to reconsider this issue at any future date should the present facts change so as to bring about an improper competitive situation or result in improper discrimination or preference".

C. The Commission's Ultimate Finding Under Section 210 That Dual Contract and Common Carrier Operations by PMT Were Consistent with the Public Interest and National Transportation Policy Is Rationally Supported by the Commission's Subordinate Findings, for Which There Is Evidentiary Support, and by the Commission's Action in Requiring PMT to Waive All Right to Transport Automobiles and Trucks as a Common Carrier and in Retaining Jurisdiction to Prevent Future Discrimination or Preference, and the Decision Is Consistent with Its Decisions in Previous Cases. It Is Therefore Conclusive Upon This Court.

The determination which the Commission is required to make under section 210 is merely another of the numerous determinations which Congress has trusted to the Commission's expert judgment and discretion. As in the

case of such other determinations, it is settled that the Commission's determinations under section 210 are binding upon the courts if rationally supported by adequate findings for which there is substantial support in the evidence. *Fine & Jackson Trucking Corp. v. United States*, 65 F. Supp. 443 (D. N. J. 1946); *Ziffrin, Inc. v. United States*, *supra*, 318 U.S. at 80. Certainly, as indicated below, such is plainly the situation here.

Considering the anti-discrimination policy behind section 210, as described above, the Commission's findings and action here rationally support the conclusion that there would be no possibility of discrimination in the present situation, and thus support its ultimate findings that the holding of dual operating rights by PMT as a common and contract carrier was consistent with the public interest and the National Transportation Policy. Thus, as we have seen, the Commission found in the prior report in the Sub 34 proceedings (R. 60), which findings were incorporated by reference in the final decision, that, in effect, the possibility of discrimination was minimal since PMT would serve but a single shipper as a contract carrier, and that PMT's past performance in a dual capacity had been satisfactory and without criticism, for which findings there was ample evidentiary support.[22] These findings were pertinent both to the dual rail-motor and dual motor common and contract carrier operations. Furthermore, to forestall any possibility of discrimination the Commission required PMT to waive specifically any rights it might have to transport as a common carrier, automobiles and trucks, the only

22. See testimony of Oliver Etzel, Executive Assistant of PMT (R. 104-105) set forth in Appendix B, page 1, hereto, that there never had been any charges of discrimination against PMT in connection with its existing dual operations in either interstate or intrastate commerce.

commodities which it was herein authorized to transport as a contract carrier, even though it had not been transporting them as a common carrier, which condition PMT complied with in order to obtain its permit. Finally, the Commission, as indicated above, even guarded against the possibility of any future discrimination by providing (R. 32) that it retained the right to "reconsider this issue at any future date should the present facts change so as to bring about an improper competitive situation or result in improper discrimination or preference".

It is self-evident from appellants' own brief that the Commission's action here is thoroughly consistent with its decisions in prior cases involving the dual operations question and that appellants' contention (Appellants' Brief, p. 50) that the Commission "imposes one, strict standard of proof, when independent carriers are involved and another, far easier standard, when the applicant happens to be a rail affiliate" is without substance. Thus, appellants in describing the previous decisions state (Appellants' Brief, p. 47):

> "It is only in those instances where the services performed as a common and contract carrier are not competitive or where the commodities to be transported by the common and contract carrier are wholly different, that the Commission has approved dual operations."

and they cite (Appellants' Brief, p. 45) the Commission's decision in *Ziffrin, Inc., Contract Carrier Application*, 28 M.C.C. 683, 698 (1941), where the Commission said:

> "The discrimination which the section is intended to obviate is always present when the same persons are able to offer both kinds of service in respect of the same commodities and between the same points."

Here, since the Commission required PMT to waive in writing all right to transport automobiles and trucks in its outstanding common carrier certificates, which commodities were the only ones it was herein authorized to transport as a contract carrier, it is obvious that the Commission did not authorize PMT "to offer both kinds of service in respect of the same commodities".

Nor is there any inconsistency between the action of the entire Commission here and that of two of its divisions in *Miller Transport Co., Inc.—Purchase—Storch Trucking Co.*, 57 M.C.C. 208 (1950) *and Indianhead Truck Line, Inc., Ext.—Service Station Supplies*, 81 M.C.C. 715 (1959), upon which appellants particularly rely (Appellants' Brief, pp. 46-50). In the *Miller* case the Commission pointed out (57 M.C.C. 215) that at least some of the same commodities which the applicant would transport as a contract carrier in containers were also susceptible of transportation by it as a common carrier in bulk in ordinary equipment and it went on to point out that a waiver of its right to transport the same commodities as a common carrier, which was exacted of PMT here, was impractical, thus:

> "In some cases involving dual operations, we have found it possible to modify either the common-or-contract-carrier operating rights for the purpose of minimizing the objectionable aspects of the dual operations, and thus to approve the transaction, subject to such modification. To accomplish this in the instant case, it would seem that such a substantial revision in the commodities which vendee is now authorized to transport as a common carrier would be required, to remove authority to serve the same shipper or shippers in a dual capacity, as to be impracticable. Vendee has advanced no proposal to modify its common-carrier operating rights. For the reasons stated, the dual operations which would result, in the event the instant

transaction were approved, would not, in our opinion, be consistent with the public interest and the national transportation policy declared in the act."

In the *Indianhead* case it appeared that applicant sought contract carrier authority to transport petroleum products, among other things, while it also transported these products in the same area as a common carrier and did not agree to waive its right to do so.

III. The Majority of the District Court Properly Held That Neither the Associations Nor Individual Appellants Were "Parties in Interest" Having Any Standing to Bring This Suit Because They Did Not Sustain Any Actual Damage or Competitive Injury from the Commission's Decision.

Appellants in their complaint alleged that this suit arose under section 205(g) of the Interstate Commerce Act (49 U.S.C. § 305(g)) and section 10 of the Administrative Procedure Act (5 U.S.C. § 1009) (R. 2). The former provides for review of Commission orders by "any party in interest". The latter provides for judicial review of agency action by "any person suffering legal wrong because of any agency action or adversely affected or aggrieved by such action", but the latter provision adds nothing to the former (*Transamerica Corp. v. McCabe*, 80 F. Supp. 704, 707 (D.C.D.C. 1948)).

This action represents the latest effort by the American Trucking Associations and other motor carrier trade associations to straight jacket the railroads by preventing their entry into motor carrier transportation on terms of equality with all others. *Cf. American Trucking Associations v. United States, supra.* Essentially this is a "dog-in-the-manger" action. It is significant that the complaint (R. 1-6) nowhere alleges that the Commission's action results in any competitive injury to the appellant truck lines

nor to the trade associations, whose standing to sue can obviously not rise higher than that of its individual truck line members. This is not surprising because it is clear from the Commission's decision that the decision results in no competitive injury to any of the appellants. Thus, even though the Commission's decision indicates that the appellant truck lines had authority to serve part but not all[23] of the involved territory, the Commission found (R. 26-28): that the GM traffic involved was all then handled by rail and would not in the future be handled by the appellant truckers, regardless of whether the applications of PMT were granted; and that the granting of the permit would not result in any loss of traffic or competitive injury to the truck lines but only in diversion of traffic from SP to PMT. Such lack of injury is also to be inferred from the fact that appellants, after their request for a temporary restraining order had been denied by the court, voluntarily withdrew their claim for an interlocutory injunction (R. 73).

We submit that on authority of *Atchison, Topeka and Santa Fe Ry. v. United States*, 130 F. Supp. 76 (E.D. Mo. 1955), *aff'd per curiam*, 350 U.S. 892 (1955), under this set of facts appellants had no standing to maintain this action. There the shoe was on the other foot. Certain western railroads and their trade association brought suit to set aside a Commission order authorizing acquisition of control of a bankrupt motor line by a financially stronger motor line. The situation there was remarkably like that here in that the complaint alleged that the plaintiffs served the same areas in competition with the motor carriers involved and that the plaintiffs had a direct interest in the enforcement of the National Transportation Policy and section 5 of the Interstate Commerce Act. The court ob-

23. None of the appellants had authority to operate from Oakland to Nevada, Utah and New Mexico (R. 24-26).

served (130 F. Supp. 76, at 78) that "The Complainant must possess something more than a common concern for obedience to law" and indicated that there must be at least actual damage over and above a threat to offer stronger competition in order to give standing to sue. In concluding that the plaintiffs therein had no standing to maintain the action the court said at page 79:

> "Though the motor carriers in the instant case may, as a combination under joint control with adequate financial backing, offer stronger competition to the railroads than they did previously, we conclude that the railroads have no 'definite legal right' to be immune from this competition and, therefore, are not 'parties in interest' who may maintain this suit."

The court in that decision also distinguished cases such as *Alton Ry. v. United States*, 315 U.S. 15, on which appellants rely (Appellants' Brief, p. 55) in which competing modes of transport had been held to have standing to sue to set aside orders granting new motor carrier operating rights in that such new rights threatened the traffic of the complainants. The same distinction exists between the situation in the *Alton* case and that here because here, too, the Commission's grant of authority to PMT does not threaten the appellants' traffic. On the same basis the present case is to be distinguished from *Interstate Common Carrier Council of Maryland, Inc. v. United States*, 84 F. Supp. 414 (D.C. Md. 1949) on which appellants also rely (Appellants' Brief, p. 56).

For the same reason the present case is also distinguishable from this court's decision in *American Trucking Associations v. United States, supra*, in which the issue of that association's standing to sue was not raised. Thus, it appears from the lower court's decision in that case, that the individual plaintiff truck lines in that case would have

sustained a direct potential loss of traffic for which they were competing, as a result of the Commission's decision. *American Trucking Associations v. United States*, 144 F. Supp. 365, 368 (D.C.D.C. 1956).

Nor does the mere fact that the appellants were parties in opposition before the Commission give them standing to bring an independent suit to set aside the Commission's order. *Pittsburgh & W. Virginia Ry. v. United States*, 281 U.S. 479, 486 (1930).

It is obvious that the majority of the court properly concluded in this connection (R. 86):

> "A majority of the court find that the association plaintiffs obviously are not persons possessed of some legal right directly and adversely affected by the administrative action, entitling them to bring an action to set aside the Commission's order. The majority further find that, not only is the complaint devoid of any allegation of direct injury, present or threatened, to the motor carrier plaintiffs by granting of the extension of operating authority to PMT, but, at the hearing on the merits, there was no showing of actual or anticipated direct injury such as would entitle them to institute this action. Had the complaint been filed by some qualified 'party in interest,' all of the plaintiffs would have had the right to intervene under the provisions of 28 U.S.C. § 2323[24] but the right to intervene presupposes the existence of an action brought by a proper plaintiff. Since none of the plaintiffs has alleged or shown standing to bring the action under the statutes providing for judicial review of the Commission's orders, it is the view of Judges Keech and

24. (Footnote 7 in court's opinion) 28 U.S.C. § 2323, third paragraph: "Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections [section 2321 of Title 28 and sections 20, 23, and 43 of Title 49] may intervene in said action at any time after commencement thereof."

Curran that the complaint must be dismissed on the further ground that plaintiffs lack standing to sue."

Appellants' contentions (Appellants' Brief, p. 57) that the holding of the majority of the court makes it within the discretion of the supporting shipper as to whether an order of the Commission granting new operating authority may be judicially attacked by protestants are without merit. It is true, as the Commission stated (R. 23), that: "Should the requested authority be denied, General Motors indicates that it will either support the application of an independent motor contract carrier presently serving a branch plant at Arlington, Tex., identified as Texas Auto Transports, Inc., for similar authority, or institute proprietary operations." But it is not for this reason that the appellants are without standing to sue. Instead, it is because, as the Commission found (R. 26-27), the traffic was then all moving by rail so that they suffered no competitive injury and because "in the territory under consideration automobiles are commodities which can be economically and advantageously transported by rail to on-rail points" so that regardless of whether the "application is granted or denied, as concerns rail points of the Southern Pacific, there will be little or no diversion to the existing independent motor operators."

Finally, appellants (Appellants' Brief, p. 58) contend that the majority decision conflicts with the usual rule that "for every right there is a remedy". But this axiom presupposes that there is no right unless there is an injury. Certainly it was not the congressional purpose in providing for expedited review of Commission orders by a three-judge court with a direct appeal to this Court, to allow this judicial machinery to be clogged by suits of parties who suffered no injury from the administrative action.

CONCLUSION

For the reasons above indicated this appeal raises no substantial question of merit. Appellants, though not injured by the Commission action are attempting to upset operating rights which have been in effect since November 24, 1958, in an effort to give the National Transportation Policy a construction which Congress, the Commission and this court have never seen fit to give it. This they would do by legal arguments which have no vitality except as to a purely fictitious case which appellants attempt to paint by baldly misconstruing both the Commission and lower court decisions. The lower court's decision should be affirmed and the costs of this appeal assessed against appellants.

Respectfully submitted,

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Certificate of Service

I, ROBERT L. PIERCE, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 25th day of April, 1960, I served copies of the foregoing brief on the several parties as follows:

1. On appellants, American Trucking Associations, Inc., its Contract Carrier Conference, National Automobile Transporters Association, Convoy Company, Robertson Truck-A-Ways, Inc., Hadley Auto Transport, B & H Truck-away, Western Auto Transports, Inc., and Kenosha Auto Transport Corp., by mailing copies, in duly addressed envelopes, with airmail postage prepaid, to Walter N. Bieneman, Esq., 2150 Guardian Bldg., Detroit 26, Michigan, to Larry A. Eskilsen, Esq., 1111 E Street, N.W., Washington 4, D.C., to Charles W. Singer, Esq., 1825 Jefferson Place, N.W., Washington, D. C., and to Peter T. Beardsley, Esq., 1424 Sixteenth Street, N.W., Washington, D. C.

2. On the United States, by mailing copies, in duly addressed envelopes, with airmail postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D.C., and Willard R. Memler, Esq., Department of Justice, Washington 25, D.C.

3. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to Robert W. Ginnane, Esq., General Counsel, and James Y. Piper, Esq., Assistant General Counsel, at the offices of the Commission, Washington 25, D.C.

ROBERT L. PIERCE

(Appendices Follow)

Appendix A

NATIONAL TRANSPORTATION POLICY

[September 18, 1940.] [49 U.S.C., preceding § 1, 301, 901, and 1001.] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

COMBINATIONS AND CONSOLIDATIONS OF CARRIERS

Sec. 5. [As amended August 24, 1912, February 28, 1920, June 10, 1921, June 16, 1933, June 19, 1934, August 9, 1935, September 18, 1940, and August 2, 1949.] [49 U.S.C. § 5.]

* * * *

(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in Section 205(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers

by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

ADMINISTRATION

Sec. 205(g). [August 9, 1935, amended September 18, 1940, and May 24, 1949.] [49 U.S.C. § 305(g).]

(g) Any final order made under this part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under Part I: *Provided*, That where the Commission, in respect of any matter arising under this part, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under Section 2284 of Title 28 of the United States Code, and such court, if it determines that the Commission has such power, may enforce by writ of

mandatory injunction the Commission's taking of jurisdiction.

TERMS AND CONDITIONS OF CERTIFICATE

Sec. 208. [August 9, 1935.] [49 U.S.C. § 308.] (a) Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204(a)(1) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

Note—Comparable provisions, part III, § 309(d); part IV, § 410(e).

PERMITS FOR CONTRACT CARRIERS BY MOTOR VEHICLE

Sec. 209(b). [August 9, 1935, amended June 29, 1938, September 18, 1940, September 1, 1950, and August 22, 1957.] [49 U.S.C. § 309(b).]

(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to Section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the

contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204(a)(2) and (6): *Provided*, That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: *Provided further*, That no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203(a)(15), as in force on and after the effective date of this proviso.

DUAL OPERATIONS

Sec. 210. [August 9, 1935, amended September 18, 1940] [49 U.S.C. § 310.] Unless, for good cause shown, the Commission shall find, or shall have found, that both a certificate and a permit may be so held consistently with the public interest and with the national transportation policy declared in this Act—

(1) No person, or any person controlling, controlled by, or under common control with such person, shall hold a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such

controlling person, controlled person, or person under common control, holds a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory; and

(2) No person, or any person controlling, controlled by, or under common control with such person, shall hold a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory.

RATES, FARES, AND CHARGES OF COMMON CARRIERS BY MOTOR VEHICLE

Sec. 216. [August 9, 1935, as amended June 29, 1938, and September 18, 1940.] [49 U.S.C. § 316.]

* * * *

(d) Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

PUBLIC LAW 85-163

85th Congress, S. 1384—August 22, 1957

AN ACT

To revise the definition of contract carrier by motor vehicle as set forth in section 203(a) (15) of the Interstate Commerce Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That part II of the Interstate Commerce Act, as amended, is amended as follows:

(1) By changing paragraph (15) of section 203 (a) thereof (49 U.S.C. 303 (a) (15)), to read as follows:

"(15) The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

(2) By adding to section 203 (49 U. S. C. 303), the following new subsection:

"(c) Except as provided in section 202 (c), section 203 (b), in the exception in section 203 (a) (14), and in the second proviso in section 206 (a) (1), no person shall engage in any for-hire transportation business by motor vehicle in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of

the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation."; and

(3) By adding to section 212 (49 U. S. C. 312), the following new subsection:

"(c) The Commission shall examine each outstanding permit and may within one hundred and eighty days after the date this subsection takes effect institute a proceeding either upon its own initiative, or upon application of a permit holder actually in operation or upon complaint of an interested party, and after notice and hearing revoke a permit and issue in lieu thereof a certificate of public convenience and necessity, if it finds, first, that any person holding a permit whose operations on the date this subsection takes effect do not conform with the definition of a contract carrier in section 203 (a) (15) as in force on and after the date this subsection takes effect; second, are those of a common carrier; and, third, are otherwise lawful. Such certificate so issued shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit."

SEC. 2. Part II of such Act is further amended (1) by inserting after the second sentence of section 209 (b) (49 U. S. C. 309 (b)) a new sentence to read as follows: "In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant; the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing

character of that shipper's requirements."; and (2) by changing the third sentence of section 209 (b) (49 U. S. C. 309 (b)) to read as follows: "The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204 (a) (2) and (6): *Provided*, That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: *Provided further*, That no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203 (a) (15), as in force on and after the effective date of this proviso."

Appendix B

TESTIMONY OF OLIVER ETZEL, EXECUTIVE ASSISTANT OF PMT (R. 104-105):

O. D. ETZEL, previously duly sworn, testified further as follows:

"Redirect examination.

* * * * * * *

By Mr. Meinhold:

Q. To your knowledge, has there ever been any complaint or claim of discrimination advanced by any shipper or consignee or other person resulting from the holding of dual authority by Pacific Motor Truck Company?

A. There has not.

Q. And, in your opinion, if this authority is granted, will any discrimination result in so far as any shipper or consignee or other person is concerned?

A. I don't believe any actual discrimination would result, and I say that for the reason that the common carrier operating rights held by Pacific Motor Trucking Company between San Francisco, Oakland, and Ashland, Oregon, has been operating for a good many years, something in excess of ten, by Pacific Motor Trucking Company; and during that period, I have no recollection of an automobile ever having been offered by the public for transportation.

While I have not analyzed all the freight bills covering that period of operation, I did ask our freight traffic manager for his recollection on the subject, and he confirms my opinion; namely, that he does not recall of an automobile having been offered for transportation, and it would seem that with the small use of that common carrier service by the public, there wouldn't be much discrimination involved.

Q. You have state-wide authority in California to transport assembled automobiles and assembled trucks as a contract carrier in intrastate commerce, have you not?

A. We do.

Q. And you are performing operations of that nature at all of the plants in General Motors Corporation in the State of California?

A. We are serving, I think, in the State of California, every General Motors dealer.

Q. And that has existed for some period of time?

A. It has, since 1935, to the northern half of the state, and I believe within a period of about three or four years thereafter to points in the southern part of the State from that territory.

Q. And to your knowledge has there ever been any complaint or claim of discrimination in so far as intrastate commerce is concerned, resulting from dual operations of Pacific Motor Trucking Company in California?

A. No, there never has been such a complaint.

Q. As a matter of fact, Pacific Motor Trucking Company does conduct common carrier operations in California, does it not?

A. It conducts very extensive common carrier operations in California, and many of those operations are conducted between points which are common to the service being provided as a contract carrier.

Q. But, of course, you don't transport the same commodities between the same points both as a contract and common carrier?

A. We do not. Our common carrier tariffs are restricted to the transportation of automobiles."

——MORE TO COME——